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# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1943**

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## No. 830

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MELVIN HYMAN, AS TRUSTEE IN BANKRUPTCY OF JOSEPH BENJAMIN LANE, AND JOSEPH BENJAMIN LANE,
*Petitioners,*

*vs.*

R. W. McLENDON, W. E. McLENDON, AND C. E. McLENDON.

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT OF THE PETITION.**

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SAM J. ROYALL,
J. J. WRIGHT,
C. B. RUFFIN,
M. W. SEABROOK,
*Counsel for Petitioner.*

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## PETITION.

*To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioners respectfully present to this Court their petition for a writ of certiorari, addressed to the United States Circuit Court of Appeals for the Fourth Circuit, commanding said court and the clerk thereof to certify to this Court the record and proceedings of the case in said court, wherein your petitioners were the appellants, together with the opinion of the Circuit Court of Appeals for the Fourth Circuit, for the review and determination of said cause by this Honorable Court.

### Reasons Relied Upon for the Allowance of the Writ of Certiorari.

The reasons relied upon for the issuance of said writ of certiorari, and upon which your petitioner believes that

the same should be issued, and which will be more fully stated hereinafter, may be summarized as follows:

The Circuit Court of Appeals for the Fourth Circuit has decided an important question of Federal law which has not been, but should be settled by this honorable Court; or has decided a Federal question in a way probably in conflict with applicable decisions of this honorable Court, to wit:

The Honorable Circuit Court of Appeals erred, it is respectfully submitted, in holding that the District Court of the United States for the Eastern District of South Carolina had jurisdiction to adjudicate the controversy here involved; which was error because the Respondents R. W. McLendon, W. E. McLendon and C. E. McLendon were adverse claimants, and under title 11, U. S. Code, Section 46, a suit like this must be brought in the Court which would have had jurisdiction in the absence of bankruptcy; which was the State Court; and the Honorable Circuit Court of Appeals erred in holding that jurisdiction was conferred on the Bankruptcy Court by consent merely because, when the McLendons petitioned the Court to adjudicate the matter in controversy, and the Court ordered that this be done, the consent of the Trustee automatically followed the Order; which was erroneous because neither the Bankrupt nor his Trustee have ever in fact consented to the jurisdiction of the Federal Court, and a correct interpretation of the statute requires that all parties concerned must concur to make such consent; and the Court having previously authorized and empowered the said Trustee to pursue the cause of action either in the Court of Common Pleas for Lee County, South Carolina, or in such other jurisdiction as may be advised and as the Trustee shall direct; and the action having been properly commenced by the bankrupt in the State Court which had first acquired

jurisdiction of the *res* to the exclusion of the Federal Court.

That the District Court had no jurisdiction to make the order of September 1, 1938; because, under the circumstances related here, the jurisdiction was vested in the State court is demonstrated by such cases as *Danciger* v. *Smith*, 276 U. S. 542, 72 L. Ed. 691, 48 S. Ct. 344; *Johnson* v. *Collier*, 222 U. S. 538, 56 L. Ed. 306, 32 S. Ct. 104, and others cited in our brief.

A more detailed statement of all the questions that are involved is set forth in the brief subjoined to this Petition, reference to which is craved as if set forth herein.

**Statement of Facts and Proceedings.**

The following factual statement, taken to a large extent from the opinion of the Circuit Court of Appeals (140 F. (2nd) 76, 78) forms the basis of the Assignment of Error which has been filed, to wit:

On September 24, 1935, the Petitioner, Dr. Lane filed a voluntary petition in bankruptcy and was adjudged a bankrupt. It was thought that the assets disclosed did not justify the appointment of a trustee and no trustee was then appointed. Dr. Lane was granted a discharge on January 20, 1936. On May 28, 1936, he instituted a suit in the Court of Common Pleas of Lee County, South Carolina, against the Respondents, charging R. W. McLendon with fraud and asking that the lands, which were embraced in the mortgage, be impressed with a trust and for an award of damages with respect to such of them as the court could not reach.

The McLendon defendants duly answered in the State Court (Stipulation, items 5 and 6, on page 3 of Record; and paragraph 3 of Answer, page 29 of Record).

On July 3, 1936, the McLendons, who were defendants in the suit instituted in the State court, filed a petition with

the court of bankruptcy asking that the discharge of the bankrupt be set aside, that a trustee of his estate be appointed and that the trustee be authorized to bring before the bankruptcy court for adjudication the matters involved in the suit in the State court. After a hearing on this petition, the bankruptcy court revoked the order of discharge and directed that a trustee in bankruptcy of the estate of the bankrupt be appointed.

Later a trustee of the estate of the bankrupt was appointed and the bankruptcy court designated counsel to represent him in the prosecution of the claim against the McLendons.

On December 1, 1937, the said trustee petitioned the District Court for authority to engage counsel, which resulted in the order of his Honor Judge Frank K. Myers, dated December 17, 1937 (R. 42), which authorized the employment of counsel, and concluded with these words:

> "All the said counsel to represent the said Trustee and to pursue the cause of action as set out in the complaint in the pending cause, either in the Court of Common Pleas for the County of Lee, or in such other jurisdiction as may be advised, as the Trustee shall direct."

The Trustee, Melvin Hyman, served on attorneys for the McLendons notice of an application to be heard on April 4, 1938, by the Presiding Judge in the State Court for an order allowing the complaint in the action commenced in the State Court by Joseph Benjamin Lane against the McLendons to be amended by making him, the said Melvin Hyman, as Trustee in Bankruptcy, a co-plaintiff therein. (See recitals in Order of his Honor, Judge F. K. Myers, dated September 1, 1938, on page 41 of Record, and Answer on page 29 of Record); showing that the Trustee tried to

intervene in and prosecute the action pending in the State Court.

On March 25, 1938, R. W. McLendon and the other defendants in the suit pending in the State court, filed summons and petition in the Bankruptcy Court, setting forth the pendency of the suit in the State Court, and asking the Court of Bankruptcy to adjudicate the matters there in controversy (R. 21) by way of a declaratory judgment and decree under the Federal Declaratory Judgments Act, of June 4, 1934 (48 Stat. at L. 955, Chap. 512; Judicial Code, Sec. 274 D; Title 28 U. S. C. A. Sec. 400) (R. 28). Answer was filed to this petition by counsel for the trustee, denying the jurisdiction of the Court of Bankruptcy, and alleging that exclusive jurisdiction in the matter rested with the State Court. The District Judge, Honorable F. K. Myers, on September 1, 1938, entered a decree, striking out the answer of the trustee enjoining him from proceeding with the prosecution of the suit in the State Court, holding that exclusive jurisdiction to determine the matters in controversy rested with the Court of Bankruptcy, and referring these matters to a special master for hearing on the merits (R. 41).

There was an appeal from the order of Judge F. K. Myers, dated September 1, 1938, which took jurisdiction into the United States Court and enjoined the proceedings which had been commenced in the Court of Common Pleas for Lee County, South Carolina. The appeal was dismissed by the Circuit Court of Appeals; because (1) not taken within time, and because (2) it was not a final order. *Hyman* v. *McLendon et al.*, 102 F. (2d), 189. Neither of these infirmities now exist as there has been a final judgment on the merits.

Before the mandate went down on the former appeal, a motion was made by appellant based on a petition for a

writ of prohibition and mandamus to prohibit the District Court from proceeding with the case and to compel that Court to remand the case to the State Court. The Circuit Court of Appeals denied this application on April 10, 1939. *Hyman* v. *McLendon,* 103 F. (2d), 294. *Certiorari* was denied by the Supreme Court October 9, 1939. 308 U. S., 563, 60 S. Ct., 74, 84 L. Ed., 472.

That application for certiorari was directed to the questions of whether the appeal had been taken in time, and whether or not it was from a final order. It was contended that the suit was a plenary suit, hence not subject to Title 11, Sections 47 and 48 of the U. S. Code, limiting the time for appeals in bankruptcy matters to thirty days, and that it could have been taken within three months provided by Title 28, Section 230. It was also contended that inasmuch as a jurisdictional matter was involved, the judgment was final. The Court below specifically overruled both of these pleas; and *no Appellate Court then passed on the question of jurisdiction,* which was ruled on specifically for the first time on January 10th, 1944, by the Circuit Court of Appeals (140 F. (2nd) 76). It is to this last ruling or decision that the present application is directed, and the former is in no sense *res adjudicata* as to the questions now raised.

The Circuit Court of Appeals then said, (103 F. (2nd) 294):

> "As the order entered in the bankruptcy proceeding could have been reviewed on appeal taken within the time allowed by statute, and as error, if any, in the lower court's holding as to jurisdiction can be corrected on appeal from final judgment, we think it clear upon the face of the proceedings, without requiring answer by the judge below, that the application for the writs should be denied." (Emphasis added.)

Pursuant to this the case has been tried, and a final judgment against appellants rendered by Judge Waring, dated March 11, 1943 (page 76 of Record).

There are a few points of fact that we desire to stress here, to wit:

(1) No trustee was appointed prior to the discharge in bankruptcy, and the reopening thereof.

(2) The action in the State Court was commenced May 28, 1936, in the interim between the discharge in bankruptcy and the reopening of the bankruptcy proceedings.

(3) The McLendons fully answered to the merits in the State Court.

(4) On December 1, 1937, the Trustee petitioned the Court for authority to engage counsel. This resulted in the order of his Honor Judge Myers dated December 17, 1937, above quoted from.

(5) That the trustee in bankruptcy elected to try to join as a party to the proceedings pending in the State Court.

Your petitioners respectfully submit that under the facts and circumstances above set forth, and under the authority of such cases as *Danciger* v. *Smith*, 276 U. S. 542, 72 L. Ed. 691, 48 S. Ct. 344; *Johnson* v. *Collier*, 222 U. S. 538, 56 L. Ed. 306, 32 S. Ct. 104, and other authorities cited in the brief of petitioner, the United States District Court for the Eastern District of South Carolina was clearly without jurisdiction of this matter, and the lawful jurisdiction thereof rested solely and exclusively in the Court of Common Pleas for Lee County, South Carolina.

The judgment complained of allowed parties, who are

adverse claimants to, and debtors of the bankrupt estate, to practically control the course of the litigation and select the forum. It took away the right of petitioners and the bankrupt to a trial before a jury of Lee County, South Carolina, where both of the real parties in interest reside.

The appeal was argued before the Circuit Court of Appeals at Richmond, Virginia, on October 12, 1943, and was decided January 10, 1944 (140 F. (2d) 76).

The mandate of the Circuit Court of Appeals was duly stayed by order of the Senior Circuit Judge; and the case is thus still in the Circuit Court of Appeals.

Your petitioners fully amplify their grounds for requesting that a writ of certiorari be ordered herein, in their brief which is sub-joined, reference to which is craved, and in which we believe there will be demonstrated upon valid authority and reason the right and necessity for this cause being heard and adjudicated by the Honorable Supreme Court of the United States.

Your petitioners present herewith a certified copy of the relevant parts of the record, including the proceedings in the Circuit Court of Appeals for the Fourth Circuit, and the opinion of said court, and state that the record below reposes in said court.

WHEREFORE your petitioners respectfully pray that a writ of certiorari be issued under the seal of this Court, directed to the United States Circuit Court of Appeals for the Fourth Circuit, sitting at Richmond, Virginia, commanding the said court to certify and send to this Court, on a day to be designated, a transcript of the record and all proceedings of the said United States Circuit Court of Appeals for the Fourth Circuit, had in this cause, to the end that the said cause may be reviewed and determined by this Honorable Court as provided by law; that its judgment may be re-

versed by this Honorable Court; and for such further relief as may be proper.

And your petitioners will ever pray, etc.

SAM J. ROYALL,
*Florence, S. C.,*
J. J. WRIGHT,
*Florence S. C.,*
C. B. RUFFIN,
*Bishopville, S. C.,*
M. W. SEABROOK,
*Sumter, S. C.,*
*Counsel for Petitioner.*

STATE OF SOUTH CAROLINA,
*County of Sumter, ss:*

MARION W. SEABROOK, being duly sworn, on oath deposes that he is of counsel for petitioners Melvin Hyman, as trustee in bankruptcy of Joseph Benjamin Lane, bankrupt; and said Joseph Benjamin Lane; that he has read the foregoing annexed petition and knows well the contents thereof; that he has also carefully read and studied the transcript of record which is to accompany the same, being the transcript of the revelant parts of the record in the case at bar; that the matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record, and that he knows of the above proceedings had, and that the facts in said petition herein stated are true, to the best of his knowledge and belief.

MARION W. SEABROOK.

Subscribed and sworn to before me this 21st day of March, 1944.

A. S. MERRIMOE,
[SEAL.] *Notary Public in and for the State of South Carolina, Residing at Sumter, South Carolina.*

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and the allegations thereof are true, as I verily believe, and in my opinion the petition is well founded, and the case is one in which the prayer of the petition should be granted by this Court.

MARION W. SEABROOK,
*Of Counsel for Petitioner.*

## BRIEF IN SUPPORT OF PETITION.

*To the Honorable Supreme Court of the United States:*

Petitioners respectfully submit to this Honorable Court the following brief in support of their petition for writ of certiorari.

### The Opinion of the Court Below.

The final judgment of the Court below, against which this application complains, is reported in Advance Sheet No. 1 to Volume 140 F. (2d), at page 76 (R. 106).

### Jurisdictional Statement.

It is believed that the questions involved are of general importance, concerning a proper interpretation of the Bankruptcy Law, and a conflict of jurisdiction between the State and the Federal Courts. It is respectfully submitted that jurisdiction of this case, which reposed in the State Court by such decisions as *Danciger* v. *Smith,* 276 U. S., 542, has been taken away by the decisions of the Courts below; which, therefore, are in conflict with application decisions of this Court.

### Questions Involved.

1. A discharged bankrupt brought a suit in equity in a State Court to impress specific property with a trust in his favor and for damages for alleged breaches of trust. Defendants were not creditors but were adverse claimants. They first submitted to the jurisdiction of the State Court by answering therein. They thereafter procured the revocation of the bankrupt's discharge because he had failed to schedule the claims set up by him in the suit in the State Court. A trustee was then for the first time appointed, and duly moved to join in the suit in the State

Court; but was prevented by Federal injunction issued in an independent suit brought by those same adverse claimants under the Declaratory Judgments Act of Congress of June 4, 1934 (Title 28, section 400, U. S. Code). Did the District Court have any jurisdiction to entertain this novel and unprecedented procedure under the circumstances?

2. Can the adverse claimants merely by their own consent, without the concurrence of the trustee, confer jurisdiction on the Federal court under Title 11, par. 46 (b)?

3. Did the vesting in the trustee of the bankrupt estate upon his appointment prevent the bankrupt from suing in the State court prior to the trustee's appointment?

4. Does not the State court have exclusive jurisdiction of this matter?

5. Have the adverse claimants stated a case for relief to them under the Declaratory Judgments Act (Title 28, section 400)?

**Statement.**

For a narration of the facts of these proceedings we respectfully refer the Court to the decision in this case dated January 10, 1944, and to the petition upon which this application is made.

There are a few points of fact that we desire to repeat here from the petition, to wit:

(1) No trustee was appointed prior to the discharge in bankruptcy, and the reopening thereof (R. 3).

(2) The action in the State court was commenced May 28, 1936, in the interim between the discharge in bankruptcy and the re-opening of the bankruptcy proceedings (R. 3).

(3) The McLendons fully answered to the merits in the State court.

(4) On December 1, 1937, the trustee petitioned the court for authority to engage counsel. This resulted in the order of his Honor Judge Myers dated December 17, 1937. The order of December 17th concludes with these words:

> "All the said Counsel to represent the said Trustee and to pursue the cause of action as set out in the complaint in the pending cause, either in the Court of Common Pleas for the County of Lee or in such other jurisdiction as may be advised as the Trustee shall direct" (R. 42).

Pursuant to this authority the Trustee endeavored to join in the action in the State court as a co-plaintiff.

We are in entire accord with the honorable Circuit Court of Appeals in the following statement, to wit:

> "On the question of jurisdiction, it is perfectly clear that, since the suit was to recover or impress a trust on property not in the possession of the bankrupt and adversely claimed by others, the bankruptcy court would have had no jurisdiction of the controversy if the McLendons had objected. In such case suit must be brought in the court that would have had jurisdiction in the absence of bankruptcy. 11 U. S. C. A. 46. It is well settled, however, that the bankruptcy court does have jurisdiction of such a controversy if the parties consent."

But we respectfully dissent from the court's view that the Trustee consented here. While it is true that the trustee in bankruptcy was an officer of the Court, and could not act contrary to the Court's direction, we can not believe that he was such an automaton as the Circuit Court of Appeals makes him. Under Title 11, Section 72 of the U. S. Code, a trustee in bankruptcy should in the first instance be elected by the creditors. The Court's power to appoint is only secondary; which makes it apparent that the trustee has at least some discretion independently

of the Court, and his acts are only subject to the Court's review. We cannot conceive that the Court must think for him.

This is especially true in this case, where the Court had previously, by its order of December 17, 1937, given the trustee authority

> "to pursue the cause of action as set out in the complaint in the pending cause, *either in the Court of Common Pleas for the County of Lee, or in such other jurisdiction as may be advised and as the Trustee shall direct.*" (Record, page 42).

Surely, the Court was thus precluded by its own order from directing to the contrary as it did in the Order of September 1, 1938.

Referring to the trustee's control by the Court, it is said:

> "But in the ordinary matters of administration he must act upon his own judgment, and he is not entitled to resort to the Court for instructions so as to avoid the responsibility of deciding upon the course to be pursued." (7 Corpus Juris, page 229.)

We believe that the Circuit Court of Appeals' proposition, that when the McLendons (not creditors, but debtors) petitioned the Bankruptcy Court to adjudicate the matter, and the court ordered this to be done, the consent of the trustee followed the order, is not sustained by the authorities cited by the Circuit Court of Appeals. The case of *In re Hadden Rodee Co.* 135 F. 886 is clearly distinguished in the case of *In re Vadner,* 259 F. 614, 634, holding to the contrary.

*In Re: Vadner,* 259 F. 614 is somewhat converse in its setting to the facts of the present situation, which would be like those of the *Vadner* case if it were R. W. McLendon, instead of Dr. Lane who were the bankrupt, and if it were McLendon's trustee who intervened in the State Court. But

the reasoning of the case very clearly shows the unsoundness of permitting the opposite parties on their mere motion or consent to thrust the case into Federal jurisdiction without consent of the trustee, solely because of the existence of a bankruptcy proceeding.

Three suits by Agnes R. Vadner against Charles S. Vadner and others, in which W. E. Pruitt, trustee of the estate of Charles S. Vadner, bankrupt, intervened, were brought in a State Court of Utah, and after consolidation were removed to the District Court of the United States for the District of Nevada, where bankruptcy proceedings against Charles S. Vadner were pending. Cases remanded. The court said in part:

> "Defendants place their main reliance on the fact that Vadner had been adjudged a bankrupt in this Court. If this circumstance is sufficient to require the divorce case, the law case, and the equity suit to be removed to the federal court for Nevada, and each issue, notwithstanding the judgment, to be tried de novo, it is apparent that the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) affords a method of bringing into the federal tribunals civil suits without limit. Any person, except a municipal, railroad, insurance, or banking corporation, is entitled to the benefits of the Bankruptcy Act as a voluntary bankrupt. If such a person owes debts, however small, he may file a petition. It is not necessary for him to allege or prove insolvency; and, furthermore, his petition cannot be opposed by his creditors. Can such a person, finding himself involved in litigation, in which the decision has been, or is likely to be, adverse, by filing a voluntary petition in bankruptcy, cause the suits against him to be removed to a federal court and there tried anew? If under such circumstances the present litigation is removable from Utah state court to the United States District Court for Nevada, what is to prevent a person who is sued in a superior court of California from residing for the greater part of the six months in Maine, and then and

there filing a petition in voluntary bankruptcy, and thus conferring on the United States District Court for Maine exclusive jurisdiction over the controversy pending in the California State Court? The possible uses which might thus be made of the Bankruptcy Act are startling to contemplate.

"Defendants argue that the trustee cannot ask the removal of these cases to the State Court, and cite in support of that proposition the decision of Judge Seaman *In re,* Hadden Rodee Co. (D. C.), 135 Fed. 886.

"The trustee is not seeking to remove cases from this Court to the Utah state court; his position is that cases pending in that court, neither removable nor properly removed here, should be remanded.

"To say that a cause in which the trustee is a party cannot be remanded after removed to this court because the trustee cannot ask it, is equivalent to saying that the removability of such causes, and the jurisdiction of this Court over them, is controlled by the parties opposed to the trustee.

"*In the Hadden Rodee Co. case supra*, there was no suit, at law or in equity, pending anywhere. The Merchants' & Miners' Bank filed a petition with the referee in bankruptcy, claiming certain shares of mining stock, which the custodian refused to surrender without the consent of the trustee." *In Re: Vadner,* 259 F., 614, 618, 633, 634. (Italics added.)

The trustee here takes the same position as in that case, that the cause of action pending in the State Court was properly there under the cases of *Danciger* v. *Smith,* 276 U. S. 542, 72 L. ed. 691, 48 S. Ct. 344; *Johnson* v. *Collier,* 222 U. S. 538, 56 L. ed. 306, 32 S. Ct. 104, and other authorities cited, and that neither this cause of action, nor any suit for a declaratory judgment necessarily determinative of it, should be brought into the bankruptcy Court; but should be sent back to the State Court, if brought to the bankruptcy Court.

The further proposition of the Circuit Court of Appeals that when the original defendants, the McLendons, by their petition submitted themselves to the jurisdiction of the bankruptcy Court and ask that the rights of the trustee as against themselves be there determined, there can be no question as to the Court's power to make the determination, puts an astonishing construction upon the statute.

This statute, Title 11, Section 46 (b), U. S. Code, as it stood before its amendment by the Act of June 22, 1938 ("Chandler Act," which has no application because this suit was commenced before the passage of the latter) provides that

> "Suits by the trustee shall be brought or prosecuted only in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendants," etc.

In other words, without a "*consent*" within the meaning of the statute, this action had to be brought in the Court of Common Pleas for Lee County, South Carolina; because both the plaintiff Lane and the defendants McLendon reside there.

It is obvious that it takes two parties to make a "*consent.*"

In 12 Corpus Juris, commencing on page 515, may be found the definition of the word "Consent." It is there variously defined as an accord of minds, acquiescence, an agreement in opinion or sentiment, an agreement of the mind to what is proposed or stated by another, an agreement of one with another to the doing of something or leaving something undone, an agreement to something proposed, voluntary allowance or acceptance of what is done or proposed to be done by another, assent to some proposi-

tion submitted implying concurrence, and so on, all of which definitions show the necessity of two or more parties to the agreement.

"Consent" is defined as a voluntary allowance or acceptance of what is done, or proposed to be done, by another; synonymous terms being to "accede, acquiesce, yield, comply, agree, concur." *Citizens' State Bank of Sabetha* v. *Burner,* 291 P. 739, 741, 131 Kan. 286; *Plummer* v. *Commonwealth,* 64 Ky. (1 Bush) 76, 78. See also *Richardson* v. *Richardson,* 114 N. Y. Supp. 912, 916; *Wilkinson* v. *Misner,* 138 S. W. 931, 935, 158 Mo. App. 551; *Clark* v. *North,* 111 N. W. 681, 682, 683, 131 Wis. 599, 11 L. R. A. (N. S.) 764, 11 Ann. Cas., 1080 (citing Century Dict.; 2 Words and Phrases, pages 1437, 1438).

We respectfully submit that there is reversible error in the view of the honorable Circuit Court of Appeals that there is no merit in the contention that the State Court first acquired jurisdiction over the *res.* The Courts admit that pending the appointment of a trustee, the bankrupt may sue for the protection of assets belonging to the estate. This upholds the right of the Petitioner Joseph Benjamin Lane to have brough suit, as he did, against the McLendons in the Court of Common Pleas for Lee County, South Sarolina, there then being no trustee appointed. That was in line with the decisions controlling in this case, of *Johnson* v. *Collier,* 222 U. S. 538, 32 S. Ct. 104, 56 L. ed. 306; and *Danciger* v. *Smith,* 276 U. S. 542, 48 S. Ct. 344, 72 L. ed. 691. We believe these cases are conclusive of the matter now at bar; for, as the present action was properly commenced in the State Court, and the trustee did not elect to move it out of that Court, then undoubtedly the State Court acquired jurisdiction, and the Federal Court had no power to take it away over the opposition of the trustee.

> "Where two courts have concurrent jurisdiction a party may elect to bring his action in either, and when

his election is made it is binding upon him, and the court in which the action is brought has exclusive jurisdiction of that particular case." 15 C. J. 1131, par. 579.

"But where the court possesses jurisdiction of the general class of cases to which a particular suit belongs, it will acquire jurisdiction over the subject matter on the parties' voluntarily coming before the court, the one demanding relief and the other defending." 4 C. J. 1349, par. 40.

The McLendons answered in the state Court.

It is a poor rule that does not work both ways. The federal Courts are very jealous of maintaining their jurisdiction in cases where the objecting party submits himself to that forum; as witness the long number of cases cited in the footnotes to Title 11, Section 46 (b) U. S. C. A., showing various acts and pleadings by adverse claimants in bankruptcy held to have been consents to federal jurisdiction.

In the matter of *Albert N. Moore,* 209 U. S. 490, 52 L. Ed. 904, a plaintiff was held to have accepted the jurisdiction of a Federal Court over a suit removed from a State Court on a defendant's petition, where, after the removal, plaintiff, instead of moving to remand, filed an amended petition in the Federal Court and signed stipulations therein. This was a case in which even the rights of a minor were involved, and yet he was held bound by these acts of his next friend to have submitted to the Federal jurisdiction. Why should not the same rule apply in regard to the State Court?

We are in entire harmony with the District Court's proposition that

"Upon the adjudication of bankruptcy, the title to all of the property of Joseph Benjamin Lane, wherever situated, vested in the Trustee as of the date of the filing of the petition in bankruptcy."

Still it was never contemplated by the bankrupt law that the valuable rights claimed by Dr. Lane should go derelict because of the absence of the functions of a trustee until one was appointed after the reopening of the bankruptcy proceeding.

The legal status of a bankrupt as a litigant is well expressed in the syllabi of the case of *Eggleston* v. *Barnett*, 220 Ala. 395, 125 So. 637, which cites United States decisions in support of its conclusions. These syllabi are as follows:

> "Title of bankrupt is not divested by adjudication of bankruptcy, but his holding is in nature of trustee ad interim, and title remains in him until there is someone in which it may vest, and on appointment of trustee title vests in latter and relates back to adjudication.
> "Pending appointment of a bankruptcy trustee, bankrupt has such title as will support an action.
> "Bankruptcy trustee, when appointed, may intervene by direction of bankrupt court and prosecute action previously commenced by bankrupt for benefit of estate."

The case of *Danciger* v. *Smith*, 276 U. S., 542, 72 L. Ed. 691, 48 S. Ct., 344, is on all fours with the issues now presented to this Court, except that the present case, as will be hereinafter shown, is somewhat stronger in its setting for supporting the right of the bankrupt to have instituted his action against these adverse claimants. In *Dancinger* v. *Smith, supra,* suit was brought by Smith in the Texas Court to recover brokerage commissions claimed to be due him from Danciger and an oil company. The present case is, as above stated, the stronger one for present purposes; because Lane did not commence his suit until after his discharge in bankruptcy, whereas Smith's case was pending

in the Texas State Court even before he filed the bankruptcy proceedings; and, although he had full knowledge of its then pendency, *he did not mention this claim in the schedules, and stated that he had no assets.* He was thereupon adjudicated a bankrupt. *No trustee was appointed for his estate, and he was granted a discharge;* all of which was precisely as has occurred in the present case. At the trial of the suit in the Texas State Court, the defendants, in addition to their defenses on the merits, relied upon the defense, appropriately pleaded, that by reason of the proceeding in bankruptcy, Smith had ceased to be the owner of the cause of action, and was not entitled to prosecute the suit, which is exactly the claim made by the petitioners McLendon in the instant case. That contention, however, was overruled, and Smith recovered judgment, which was affirmed by the Texas Court of Civil Appeals, from whence the case came on a writ of certiorari to the United States Supreme Court, and that tribunal affirmed the judgment below.

Appellees' counsel claimed below that the failure to appoint a trustee in the first instance was due to the fraud of the bankrupt, for which he would not be permitted to obtain any advantage. It can just as well be said that the failure to appoint a trustee in the *Danciger* case, *supra*, was a similar fraud, and yet the United States Supreme Court took no such view as that advanced by counsel, and distinctly held that the bankrupt, Smith, could take advantage of the fact that no trustee was appointed, and thereby maintain his action in the Texas State Court.

The case of *First National Bank* v. *Lasater*, 196 U. S. 115, 49 L. Ed. 498, referred to by the Circuit Court of Appeals by way of comparison, does not in any way lessen the effect of *Danciger* v. *Smith*, *supra*, where there

also was a failure by the bankrupt to list the claim involved among his assets in the Bankrupt Court. The *Danciger* case was a much later decision, which the Court itself well distinguished from the *Lasater* case. There was a trustee appointed in the *Lasater* case; there was none in the *Danciger* case and none here. A total outsider, like the bank in the *Lanaster* case, sued for usury in the payment of a note, which the main decision in the case, upon which it really turned, held not recoverable because the note was paid with another note instead of cash, had a right, of course, to take the position that since the trustee had never taken any action in respect to it, the bankrupt who had failed to report it to him, could not; since the right of action if any was vested in the trustee, whether he knew about it or not. But how does that affect a situation in which there was no trustee in which it could vest, or who could have acted?

The *Lasater* case, moreover, is explained in page 282 of Volume 19 of "Rose's Notes on U. S. Reports, Revised Edition and on page 123 of Supplement No. 4 to the same, which authorities show that the statement in the syllabus of the case, to the effect that title cannot be asserted by the bankrupt upon the termination of the bankruptcy proceedings, where he returned no assets to the trustee, means nothing more than that the 'bankrupt cannot after discharge retain for himself such property if it prove valuable'." Of course not. We do not contend that Lane can retain it for himself without accounting for it to Mr. Hyman, the trustee.

The U. S. Supreme Court, in *Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231, 67 L. Ed. 226, 231, 43 Sup. Ct. Rep. 79, quotes with approval, from *Baltimore & O. R. Co.* v. *Wabash R. Co.*, 57 C. C. A. 322, 119 Fed. 680, to the effect that when a State Court and a Federal Court

may each take jurisdiction, the tribunal which jurisdiction first attaches (the State Court, in this instance) holds it to the exclusion of the other; that the rule is not only one of comity, but it is a principle of right and law, and therefore of necessity, leaving nothing to discretion; and that this suit applies to suits to administer trusts.

As Judge Sibley of the Northern District of Georgia puts it: "the Court that is first in time is first in right." *In Re: Gallimore,* 16 F. (2d) 801.

The effort to sustain Judge Myers' statement (pg. 34 of record) that this proceeding was brought under the authority of the Declaratory Judgment Act of Congress of June 4, 1934 (48 Stat. at L. 955, Chapter 512; Judicial Code, Section 274 D; Title 28, U. S. C. A. Section 400) seems to have been long since abandoned by the Appellees, as it was not urged in the Circuit Court of Appeals, and was not referred to by that Court. It serves, however, to show the amazing stretches of the procedure followed in this case. The defendants, sued in a State Court of perfectly competent jurisdiction, have been allowed to make of themselves plaintiffs in a Federal Court, and to stop by injunction the proceedings in the former Court. Debtors, adverse claimants and defendants have been permitted to select the forum and control the litigation!

We are unable to argue the merits here, because of Petitioners' inability to finance the presentation of the whole record to this Court. But we will say that all the essential allegations of the plaintiff's complaint in the State Court have been supported with evidence; and yet the defendants have been acquitted of all the charges there laid on grounds which to us appear to be sheerly technical, and without any of the McLendons being even required to make a statement in explanation of what they have done.

All of their tactics have been directed to evading any answer to the charges; and to keep out of a Court where they may have to face a jury of their fellow citizens.

Respectfully submitted,

SAM J. ROYALL,
J. J. WRIGHT,
C. B. RUFFIN,
M. W. SEABROOK,
*Attorneys for the Petitioners.*

(1148)

# Supreme Court of the United States

OCTOBER TERM, 1943

No. 930

MELVIN HYMAN, as Trustee in Bankruptcy of Joseph Benjamin Lane, and JOSEPH BENJAMIN LANE, Petitioners,

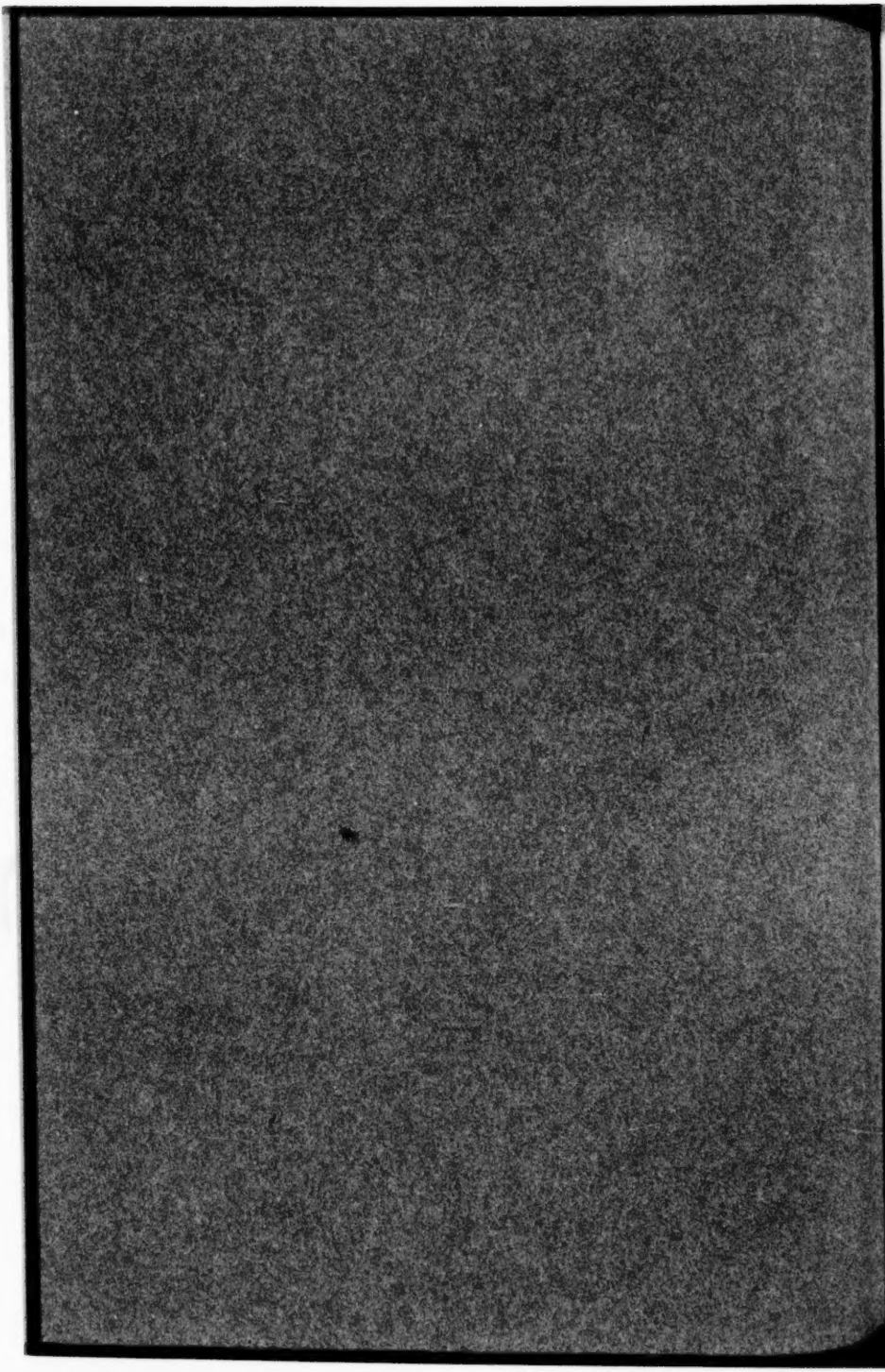
vs.

R. W. McLENDON, W. E. McLENDON, and C. E. McLENDON, Respondents.

## REPLY BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

HENRY E. DAVIS,
Florence, S. C.,
SAMUEL WANT,
Darlington, S. C.,
H. C. JENNINGS,
Bishopville, S. C.,
Attorneys for Respondents.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.



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# Supreme Court of the United States

OCTOBER TERM, 1943

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**No. 830**

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MELVIN HYMAN, AS TRUSTEE IN BANKRUPTCY OF JOSEPH BENJAMIN LANE, AND JOSEPH BENJAMIN LANE, PETITIONERS,

*versus*

R. W. McLENDON, W. E. McLENDON, AND C. E. McLENDON, RESPONDENTS

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## REPLY BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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### I

### THE FACTS

The facts involved in the present controversy are fully stated in an able report made by the Special Master (R., 47). The findings of fact made by the Special Master are concurred in by the District Judge (p. 83), and are adopted by the Circuit Court of Appeals (R., 95).

As far as material to the matter before this Court, the facts are as follows: Starting in 1922, there had been many dealings between Lane and the Messrs. McLendon, as the result of which Lane claims that the Messrs. McLendon

have in their names certain valuable real estate to which he is entitled, and that they are liable to him for moneys had and received and for damages sustained by him to the extent of $85,000.00. As the result of the various transactions between the parties Lane had brought certain suits against the Messrs. McLendon, seeking largely the same recoveries which are sought in the present litigation (R., 52, 53, 59). There were also legal proceedings on the part of the McLendons against Lane involving some of the transactions now in issue (R. 49, 51). As the result of the litigation in question the parties in 1932 entered into a settlement agreement, under the terms of which adjudications were made in the state court adjusting the respective rights and liabilities of the parties (pp. 54-56). As the Circuit Court of Appeals says:

> "The settlement disposed of all the matters in controversy between the parties, including those here in litigations" (R., 102).

On September 24th, 1935, Lane filed his bankruptcy petition disclosing no assets available for the payment of his debts, and showing total indebtedness amounting to slightly over $24,000.00 (R., 57). The bankruptcy court did not appoint a trustee, and on October 28th, 1935, the bankrupt filed a petition for his discharge. In this petition (General Orders in Bankruptcy, Form No. 41) Lane alleged under oath that he had made a full disclosure to the bankruptcy court of all of his assets and liabilities, just as he had previously done in his schedules (General Orders in Bankruptcy, Form No. 1).

On January 20th, 1936, an order discharging Lane in bankruptcy was granted.

On May 7th, 1936, Lane instituted in the Court of Common Pleas of Lee County, South Carolina, the action which is the subject-matter of the present litigation (R., 57). In this action Lane asserted that a certain tract of land of 127

acres, formerly owned by him, and which had been acquired by one of the McLendons in foreclosure proceedings under a mortgage made by Lane to a bank, was in fact his and that he was entitled to have the title conveyed to him free of all encumbrances thereon. In the same suit Lane demanded damages in the amount of $85,000.00 based upon various alleged financial transactions in connection with which he claims to have placed money in the hands of R. W. McLendon, and to have sustained damages as the result of the handling of certain of his lands by the McLendons. The transactions involved in the allegations in this suit began in 1922 (R., 47).

There being nothing before the bankruptcy court at the time of the institution of this action, it was of course necessary for the McLendons to answer in the state court to protect their rights. This they did, setting up in their answer, however, certain special defenses calling attention to the failure of Lane to disclose the resources in question in his bankruptcy proceeding, and setting forth that title to such assets rested in the bankruptcy court alone, and that Lane was not entitled to prosecute any suit respecting the same (see *infra*, IIIc).

On July 3rd, 1936, the Messrs. McLendon filed a petition in the bankruptcy cause submitting themselves to the jurisdiction of the bankruptcy court, alleging that the bankrupt had obtained his discharge by fraudulent concealment of his assets, and praying that the discharge previously granted be revoked, and that the bankruptcy cause be reinstated and fully administered in the bankruptcy court. On this petition the court adjudged that Joseph Benjamin Lane had been guilty of fraudulent concealment of his assets, and that his discharge had been fraudulently obtained. It was thereupon ordered by the court that the discharge previously granted be revoked, that the cause be reinstated,

and that a trustee be appointed with power to enforce and have the benefit of such claims as the bankrupt was making in the state court (R., 58).

A trustee was thereupon appointed by the bankruptcy court (*ibid.*).

On or about March 25th, 1938, the McLendons filed a petition in the bankruptcy court setting forth the attempt of Lane to continue the prosecution of the action in the state court, submitting themselves to the jurisdiction of the federal court in respect to all of the matters in question, and praying a decree adjudicating "the rights and relations of the petitioners and the respondent respecting all of the matters in dispute and the controversies existing between them as set forth in this petition" (R., 58). The matters set forth in the petition are admittedly the identical matters which were set forth by Lane in his action in the state court (R., 59, *et seq.*).

On this petition the bankruptcy court "abated" the state court action (R., 40); more accurately, it simply accepted the submission of the McLendons to the jurisdiction of the bankruptcy court; it further restrained the continued prosecution of the state court suit and directed that all of the matters in issue be tried in the bankruptcy court. A special master was appointed to take the testimony of the parties.

It will be observed that the fundamental issues presented by the McLendons as controlling the claims of Lane were that all of the matters in controversy had been settled by specific adjudications made in decrees of the Court of Common Pleas of Lee County, South Carolina (R., 61-62), and that as a result of such decrees, and also independently thereof, both Lane and the Trustee were estopped to assert the claims in question.

It was upon this state of the record that the following material findings and decrees were made in the present cause:

(1) The Special Master concluded that Lane is estopped to maintain the litigation, but that this estoppel does not bind the Trustee; also that the doctrine of *res judicata* does not bar the prosecution of the action on behalf of the Trustee, solely for the benefit of the creditors of Lane (R., 76).

(2) The District Judge concurred in all of the findings of fact of the Special Master; he also concurred in the conclusion that Lane is estopped to prosecute his claims; he held however that under the doctrine of *res judicata* neither Lane nor the Trustee may recover on any of the asserted causes of action. The District Judge makes the additional legal finding that the trustee in bankruptcy "has failed to substantiate his claims" against the McLendons. He disallowed and dismissed all of the claims (R., 83-84).

(3) The Circuit Court of Appeals affirmed the decree of the District Judge. It went a step further to show that the result of the litigation has been to disclose that there is no longer anything substantial in the controversy between the parties, because the McLendons directly or indirectly own and control the greater part of the claims of the creditors of Lane (see *infra*, II).

## II

## MERITS OF CASE HAVE BECOME MOOT

The sole question presented by the petition relates to the jurisdiction of the District Court sitting in bankruptcy to adjudicate the question whether the Messrs. McLendons had in their hands assets belonging to the bankrupt, and whether they were accountable to him by way of damages

for moneys withheld and on account of their handling of certain transactions for the bankrupt.

Will this Court go into the jurisdictional issue when, as clearly appears from the record, it has been definitely and finally adjudicated that the prosecution of the Lane claims, both by the Trustee and by Lane himself, is barred under the doctrine of *res judicata* (which is the equivalent of saying that said claims are legally non-existent)?

Even if a jurisdictional question is presented, the litigation involves problems that have become moot. The stated object of the litigation in the first instance was to recover for Lane (exclusively) a tract of 127 acres, and 85,000.00 in damages and by way of accounting. After the Trustee in bankruptcy was appointed the stated object of the litigation then was to recover these resources first for the benefit of the creditors of Lane, and, to the extent of the excess, for the benefit of Lane.

The Special Master concluded that the claims could not be prosecuted for the benefit of Lane individually, because he was estopped in equity to assert the claims made by him, but that the cause could be prosecuted to a conclusion by the Trustee in bankruptcy to the extent solely of the interests of the bankrupt's creditors. The District Judge concurred in the findings of fact and conclusions of law of the Special Master to the extent that Lane was personally denied any right of recovery; he however concluded that the bar of the defense of *res judicata* is applicable to the Trustee in bankruptcy and to Lane alike, and that accordingly no recovery on the merits may be had in the present litigation by either.

There being no appeal from the decree of the Circuit Court of Appeals substaining the District Court on the merits, the present status is that if a writ of certiorari is granted on the sole ground upon which the application is

based, to wit, the jurisdiction of the federal court, and if this Court were to conclude that the federal court is without jurisdiction of the controversy, the result would be that the Trustee would be in the position of having to proceed with litigation in the state court in the face of a final ruling in the federal court that neither he nor the bankrupt has any rights in the premises, or he would have to abandon the litigation entirely.

Passing that anomalous phase of the matter, however, the fact that the matters in controversy have become strictly moot is shown by the finding of the United States Circuit Court of Appeals to that effect. It will be observed that after stating its conclusion "that the trustee in bankruptcy is precluded from recovery by the settlement which is binding upon Lane", the Court says:

> "The point last discussed has not been stressed in the briefs of counsel, possibly because, as we understand from the argument, the greater portion of the debts listed by the bankrupt are owing to the McLendons or to corporations owned or controlled by them and there would be little advantage or disadvantage to anyone from a recovery by the trustee accruing solely to the benefit of these creditors. The real controversy here is between Lane and the McLendons and it has been so presented. As stated above, we think that Lane was clearly bound by the settlement embodied in the court orders of February, 1933, and the trustee is in no better situation. If he were, the matter would have little practical significance, since the estoppel against Lane would mean that, as a practical matter, recovery by the trustee would be limited to the amount of the bankrupt's debts and would be returned to those from whom recovery was made or to corporations controlled by them (R., 104-5).

In other words, the present object of the litigation, whether taken to be a recovery for the benefit of Lane alone or for the Trustee in bankruptcy alone or for the benefit of

both is destroyed by the concurrent conclusions of the Special Master, the District Judge, and the United States Circuit Court of Appeals that there can be no recovery on behalf of Lane, and by the concurrent conclusions of the District Court and of the Circuit Court of Appeals that there can be no recovery on behalf of the Trustee in bankruptcy. If a recovery were had by the Trustee in bankruptcy it would operate, as the Court of Appeals says, principally for the benefit of the respondents "and there would be little advantage or disadvantage to anyone from a recovery by the trustee accruing solely to the benefit of these creditors."

In short, at this stage of the litigation as appears from this statement of the Circuit Court of Appeals, there is no longer any real controversy between the parties for the reason that the McLendons own or control the claims that would be benefited if the litigation were to continue. The case therefore comes within the decision of this Court in *Chamberlain v. Cleveland,* 1 Black, 419, 17 L. Ed., 93. In that case the litigation between the parties amounted to an actual controversy and was prosecuted with vigor and in good faith until a decree was rendered by the lower court in favor of the plaintiff. After this happened the defendant became the owner of the plaintiff's judgment and, as this Court said, the real actor in the litigation on both sides thereof. In this state of facts the Court said that the defendant having become the sole party in interest on both sides of the controversy the case became moot and could not be entertained. The Court held that the case was controlled by the principle decided in *Lord v. Veazie,* 8 Howard, 251, 12 L. Ed., 1067, even though that case originated in collusion and was never prosecuted in good faith.

In the case of *American Wood Paper Company v. Heft,* 8 Wallace, 333, 19 L. Ed., 379, this Court held that where

a plaintiff owns both sides of the litigation the case cannot be heard by this Court as the litigation is no longer real.

Other decisions of this Court to the same effect are:

*Hatfield v. King*, 184 U. S., 162, 46 L. Ed., 481;

*California v. San Pablo, etc., R. Co.*, 149 U. S., 308, 37 L. Ed., 747;

*United States v. Hamburg, etc., Co.*, 239 U. S., 466, 60 L. Ed., 387.

An excellent state case on the same proposition is *Harp v. Abbeville, etc., Company*, 33 S. E. (Ga.), 998 which was decided on the authority of the decisions of this Court.

## III

## JURISDICTION OF BANKRUPTCY COURT

### (a) General Considerations

Relating the question of jurisdiction to a résumé of the undisputed facts, the petitioners contend that a court of bankruptcy was without jurisdiction in the following situation:

> In 1936 a debtor obtained his discharge in bankruptcy on schedules and on a petition in which he showed under oath that he had no assets available for the payment of his debts, which were substantial in amount. No trustee was appointed in the bankruptcy proceeding. Within a few months after obtaining his discharge he brought an action in the state court in which he disclosed his alleged ownership of a valuable tract of land and of large sums of money held by one or more of the defendants under a trust *ex maleficio*, and of a right of action for a large amount of damages for mismanagement of his affairs, none of which assets or rights or claims were disclosed in the bankruptcy proceedings.
>
> With the state court action pending the defendants therein (who in addition to being charged with the

possession of the bankrupt's property, are creditors of the bankrupt) petitioned the bankruptcy court to take jurisdiction of the situation and, because of the bankrupt's fraud, to revoke the bankruptcy discharged. The discharge was revoked.

The defendants in the state court action then again petitioned the bankruptcy court, this time to adjudicate the issues respecting the lands and moneys claimed by the bankrupt in the state court action, and to stay the further prosecution of the state court action. This petition was granted. A trial on the merits was held before a special master. On the facts so adduced, the District Court and the Circuit Court of Appeals ruled that under the doctrines of estoppel and *res judicata,* the bankrupt had and has no such assets or claims as are set forth in the state court action and in the proceeding in the bankruptcy court.

In determining whether the bankruptcy Court had jurisdiction it is of course wholly immaterial whether the District Judge was correct in holding this proceeding to be a summary proceeding, rather than a plenary one, and in holding that the proceeding is maintainable under the Declaratory Judgment Act, if the fact be that the proceeding is maintainable on any other legal basis. We are dealing with the question of the correctness of the holding of the District Judge that the bankruptcy Court has jurisdiction, and not with the question whether the reasons given by him for so holding are the correct reasons.

If we assume first that the proceeding is maintainable only as a plenary proceeding, the record discloses that all of the requisites of a plenary proceeding are present. The many cases on this subject are compiled by Remington, Vol. V (4th Ed.), Sec. 2134. The characteristics of a plenary suit, as the author shows, are the service of process, the formulation and joinder of issues by pleadings, and the holding of a trial in accordance with the usual forms of procedure. Here all of such requisites are present. The ap-

appellants have been properly brought before the Court by a summons served with an appropriate pleading; while challenging the jurisdiction of the Court, they were given and exercised the right to go into a full presentation of their claims in a formal trial; and the trial was conducted in strict accordance with the procedure of a cause in equity.

But that phase of the problem is hardly material. As the Circuit Court of appeals held on a prior appeal in the present litigation (102 Fed. (2d), 189) the order of the District Judge assuming jurisdiction "was made in the bankruptcy proceedings, was entitled therein, and directed the trustee as to the conduct of litigation for the benefit of the bankruptcy estate".

It was certainly within the power of the bankruptcy Court to direct the trustee, its officer, as to the manner and form in which he should proceed to recover for the bankrupt estate the large amount of assets which, according to the bankrupt, was available to be collected and administered by the trustee.

The rule is thus stated in 8 C. J., page 1021:

> "A trustee in bankruptcy is an officer of the court, and as such he is subject, in his actions in connection with the administration of the estate, to the control of the court. He must keep the court fully and frequently advised of his actions as trustee and can in important matters act only with the approval of the court."

As stated in *Pearson v. Higgins,* 34 Fed. (2), 27 (C. C. A., 9th); Cert. denied, 280 U. S., 593, 74 L. Ed., 641:

> "The trustee is an officer of the court, as fully under its control as would be a receiver."

In *Imperial Assurance Co. v. Livingston,* 49 Fed. (2d), 745-749 (C. C. A., 8th), the Court said:

> "* * * The receiver and the trustee are officers of the court for the purposes of handling such prop-

> erty in accordance with the directions of the court within the Act. * * * "

As applied to the maintenance of suits by a trustee, the rule stated is confirmed by Section 29 (C), Title 11, U. S. C. A., where it is provided that "A receiver or trustee may, *with the approval of the court,* be permitted to prosecute as receiver or trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him." (Emphasis added.)

In 2 Rem. on Bankr. (4 ed.), page 668, the rule is stated as follows:

> "The trustee as an officer of the court is subject to the summary jurisdiction of the court. As an officer he is subject to the court's direction in all matters concerning property or money which come into his possession by virtue of his office."

This conclusion clearly follows from the pertinent statutory directions governing the administration of a bankrupt estate by the trustee. For example, although the trustee is nominated by the creditors he is appointed by the court under statutory restrictions to prevent a monopoly of appointments within a given district (U. S. C. A., Title 11, Sec. 76(a); 202(d). If the creditors fail to nominate, the court makes its own appointment (*Ibid.*, Sec. 72). The amount of the trustee's bond (*Ibid.*, Sec. 78(c)), and the amount of his compensation (*Ibid.*, Sec. 76(a); 76(c)) are fixed by the court. In the management of the estate he at all times acts "under the direction of the court" (*Ibid.*, Sec. 75(a); Sec. 49).

If the proceeding is held to be a summary proceeding, the petitioners apparently concede that the procedure adopted is unexceptionable, and in fact goes far beyond the requirements of the situation.

The distinction between a plenary proceeding and a summary proceeding, as deduced from the great many

cases dealing with the subject, is thus stated in *Babbitt v. Dutcher*, 216 U. S., 102, 54 L. Ed., 402, 30 S. Ct., 372, 23 A. B. R., 519:

> "There are two classes of cases arising under the Act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation; who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated. In the latter case it is not necessary to bring a plenary suit, but the bankruptcy court may act summarily and may make an order in a summary proceeding for the delivery of the property to the trustee, without the formality of a formal litigation."

While the matter is in no way controlling of the issue before the Court, there are factors connected with the handling of the litigation on behalf of the petitioners, even in the present phase of the proceedings, that are wholly inconsistent with the spirit of the bankruptcy law and of the established practice in bankruptcy courts. We let the following facts speak for themselves:

As correctly stated in petitioner's brief, the District Judge, under date of December 17th, 1937 (R., 42), authorized and empowered the Trustee to employ Messrs. Royall and Wright, together with L. D. Jennings and C. B. Ruffin, as his attorneys to pursue the matters involved in the present litigation. Of the attorneys so appointed C. B. Ruffin was the attorney of record in the original bankruptcy proceeding.

The same attorney and L. D. Jennings (now deceased) are the attorneys who instituted the suit in the Court of Common Pleas for Lee County. Mr. Seabrook came into the case after the state court suit was stayed and is actively representing and defending the conduct of the bankrupt, as well as nominally representing the trustee. The firm of Messrs. Royall and Wright have never appeared before the Court at any stage of the litigation, except to the extent that they signed their names or permitted their names to be signed to the various pleadings filed during the progress of the cause.

That the litigation has been conducted on behalf of the bankrupt and the trustee solely, by the bankrupt's attorneys, and solely for the personal benefit of the bankrupt, is an inescapable fact. Without qualification it might properly be said that as far as the intent and purposes of the bankruptcy law are concerned, the whole of the litigation, starting with the institution by Lane of his bankruptcy proceeding, has constituted the grossest kind of mockery and indeed defiance of the bankruptcy court just as, on the merits, his disregard of the several proceedings in the state court which constitute a bar to the prosecution of the litigation in any court shows a comparable attitude of cynicism and indifference.

What the petitioners are really complaining about is that they have been denied the right to prosecute to a final conclusion in the state court a concealed cause of action which should have been brought into the bankruptcy court to be there dealt with free of all contamination with the purposes that have actuated the bankrupt at every stage of the litigation.

### (b) Consent of Adverse Claimants

The applicable statutory provision (U. S. C. A., Title 11, Sec. 46) is as follows:

> "Section 46. JURISDICTION; UNITED STATES AND STATE COURTS. (a) The United States district courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy, between trustees as such and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.
>
> "(b) Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section 96, subdivision b, of this title; section 107, subdivision e, of this title; and section 110, subdivision e, of this title."

The exception in subdivision (b), referring to Section 110, subdivision (e), is that the trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and that the court of bankruptcy and the state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.

The petitioner contends that although the respondents submitted themselves to the jurisdiction of the bankruptcy court by their petition in July, 1936, and again by their petition on March 25th, 1938, and thus consented that the bankruptcy court assume jurisdiction over the claims made against them, the jurisdictional foundation had not been created under Sec. 46(b), *supra*, because the Trustee re-

sisted the proceeding in the bankruptcy court under the direction of the District Judge, instead of on his own volition. We submit that this position is without merit, and that the facts hereinbefore stated show that jurisdiction in the bankruptcy court was conferred by the concurrent consent of the respondents and the action of the Trustee acting under the Court's direction.

In the order of the District Judge made in the bankruptcy cause on September 1st, 1938 (R., 39), the Court said:

> "The actions of the McLendons in this case, beginning with the filing of their petition in July, 1936, and continuing down to the present time, clearly show that they have converted all controversies between them and the respondent, Melvin Hyman as Trustee in Bankruptcy of Lane, into a summary proceeding within the exclusive jurisdiction of this court. From this it follows that they have acquired such standing in the bankruptcy cause as to entitle them to demand as a right the adjudication by the bankruptcy court of all such controversies without any reference whatever to the Declaratory Judgment Act of Congress."

In the opinion of the Circuit Court of Appeals dismissing the petitioner's appeal from this order that Court said:

> "The order appealed from was no more than an order entered in the bankruptcy proceedings of Dr. Lane, directing the Trustee to litigate the claim against the McLendons in the court of bankruptcy, **to the jurisdiction of which the McLendons had submitted themselves,** rather than in the State court." (Emphasis added.)
>
> *Hyman v. McLendon,* 102 Fed. (2d), 189.

It thus appears that both the District Court and the Circuit Court of Appeals have held that the McLendons submitted themselves to the jurisdiction of the bankruptcy Court, and as the District Judge stated, this submission was in July, 1936.

The voluntary submission by the McLendons to the jurisdiction of the bankruptcy Court is not at all, as petitioners suggest, a one-sided affair. If, as they contend, the consent which the law contemplates imports action on behalf of the bankruptcy Court as well as on behalf of the adverse claimants, such joint action is present here. It consists of the petition of the McLendons that the Court assume exclusive jurisdiction of the matters in issue and of the order of the District Judge accepting such jurisdiction for the bankruptcy Court.

If, as contended by appellants' counsel, there must be concurrent consents of the trustee and of the adverse claimants, can it be seriously contended that the trustee's powers exceed those of the Court, and that while the trustee could consent to the assumption of jurisdiction, the Court itself is without the power to assume such jurisdiction, or to direct the trustee in respect thereto?

Every Federal case that we have been able to find holds clearly and positively that the consent of the trustee has absolutely nothing whatever to do with the question of jurisdiction. On the contrary, the right to have a controversy involving the adverse claimant or his property determined by the Federal Court of bankruptcy is a privilege that belongs to such claimant alone, and if he sees fit to submit himself and his rights to the jurisdiction of the Federal Court and ask such Court to adjudicate all controversies between him and the bankrupt, or the trustee in bankruptcy, neither of these can raise the slightest objection.

See, for example:

*United States Fidelity & Guaranty Co. v. Bray,* 225 U. S., 205, 56 L. Ed., 1055;

*Schumacher v. Beeler,* 293 U. S., 367, 79 L. Ed., 433;

*Re: Hollingsworth & Whitney Co.*, 242 Fed., 753 (C. C. A., 1st);

*Peoples National Bank v. Green*, 296 Fed., 294 (C. C. A., 4th);

*Re: Bennett*, 285 Fed., 351 (C. C. A., 7th);

Notes Nos. 131-137, incl. U. S. C. A., Title 11, Sec. 46.

**(c) Effect of Reopening Bankruptcy and Appointment of Trustee on Further Prosecution of State Court Suit**

It is submitted that the fact that no trustee was appointed in the bankruptcy proceeding until after the revocation of the discharge is not a consideration affecting the jurisdiction of the bankruptcy Court. The rule undoubtedly is, as contended by petitioners, that where no trustee has been appointed, or where one has been appointed and rejects an asset consisting of a cause of action, or fails or refuses to proceed for the collection of the asset, the bankrupt has sufficient title to proceed in his own name. In this situation, however, the trustee could at any subsequent time intervene and insist upon the collection of the asset for the benefit of the bankruptcy estate.

But this rule presupposes an honest disclosure by the bankrupt of the existence of the asset. Where he fraudulently withholds from the bankruptcy Court the fact of the existence of the asset, and by that means prevents the trustee from acting, or as in this case prevents the election of a trustee, the rule has no application. This was explicitly decided in the case of *First National Bank v. Lasater*, 196 U. S., 115, 49 L. Ed., 408, where the Court said:

> "The question then presented is whether this right of action, having once passed to the trustee in bankruptcy, was retransferred to J. L. Lasater upon the termination of the bankruptcy proceedings, he having returned no assets to his trustee, and having failed to

notify him or the creditors of this claim for usury, and beginning this action within less than two months after the final discharge of the trustee. We have held that trustees in bankruptcy are not bound to accept property of an onerous or unprofitable character, and that they have a reasonable time in which to elect whether they will accept or not. If they decline to take the property, the bankrupt can assert title thereto. (Citing cases.) But that doctrine can have no application when the trustee is ignorant of the existence of the property, and has had no opportunity to make an election. It cannot be that a bankrupt, by omitting to schedule and withholding from his trustee all knowledge of certain property, can, after his estate in bankruptcy has been finally closed up, immediately thereafter assert title to the property on the ground that the trustee had never taken any action in respect to it. If the claim was of value (as certainly this claim was, according to the judgment below), it was something to which the creditors were entitled, and this bankrupt could not, by withholding knowledge of its existence, obtain a release from his debts, and still assert title to the property."

The cases upon which appellants rely on this point are clearly distinguishable. For example, in the case of *Danziger v. Smith*, 276 U. S., 542, 72 L. Ed., 691, the bankrupt had brought suit in the State Court to recover brokerage commissions claimed to be due him. While the suit was pending he assigned the claim in separate parts to various persons, agreeing to continue the prosecution of the suit in his own name and to account for the proceeds. More than four months thereafter, while the suit was still pending, he filed a voluntary petition in bankruptcy. He did not mention the suit in question in his schedules. No assets were disclosed; no trustee was appointed; and the bankrupt was discharged.

At the trial of the case in the State Court the defendants took the position that by reason of the pendency of

the bankruptcy proceeding, Smith's right to proceed in the State Court terminated. This contention was overruled in the State Court, and is the subject-matter of the decision of the Supreme Court of the United States.

The decision of the State Court was sustained on the ground that the bankrupt's title to a right of action was not under the above-stated facts divested by the proceeding in bankruptcy.

It will be perceived, however, that the crux of this case was that the bankrupt had divested himself of the ownership of the claim in question **prior** to the filing of his petition in bankruptcy. The ruling made in the *Lasater case, supra,* is stated by the Court in its opinion, and that case is distinguished on the ground that there a trustee had been appointed to whom the right of action involved in the State Court proceeding had passed. In the *Lasater case,* of course, the disclosure of the claim would have been immaterial, as far as the appointment of a trustee is concerned, because the claim had been assigned. In the present case a trustee has been appointed and not only has the claim not been assigned, but it is a claim of so substantial a character as would materially affect the rights of all of the creditors of the bankrupt, as well as of the bankrupt himself.

So too as to cases like that of *Johnson v. Collier,* 222 U. S., 538, 56 L. Ed., 306, likewise cited by petitioners. All that this case holds is that where a bankrupt, before the filing of his voluntary petition, had brought a suit for damages in a State Court, the prosecution of this suit in the State Court in the name of the bankrupt is permissible, so long as the trustee does not act, subject to the rule that any recovery obtained in the State Court suit would enure to the benefit of the bankrupt estate. The trustee in that case had taken no action in the matter.

As distinguished from the situation in the two cases last above referred to, here we have a trustee in bankruptcy duly appointed, directed by the Court which appointed him to pursue the claims in question in an appropriate proceeding in the bankruptcy Court, and by that means rectify the situation that had been created by the fraud of the bankrupt in obtaining his discharge, without a disclosure of the existence of the asset, and in procuring the termination of the bankruptcy proceeding without a trustee being appointed.

Unlike those cases, the present case does not involve the question whether, if the trustee in this case had failed to take any interest in the situation in the Lee County Court, the defendants could have successfully maintained their defense that by reason of the bankruptcy proceeding, and the fraud of the bankrupt connected therewith, the action in the State Court was not maintainable.

The elements of the question now under discussion having however been so fully covered in the order of the District Judge dated September 1, 1938, it would be merely repetition to cite and discuss the authorities here. Reference is made to that order (pp. 87 *et seq.*).

The statement in the brief of petitioner (p. 11) that "they (the McLendons) first submitted to the jurisdiction of the state court by answering therein", is misleading. The implications of that statement are contrary to the facts. The Circuit Court of Appeals had before it the answer interposed by the McLendons in the state court, since under the rules of said Court all of the pleadings in the case go up to the Court, whether they are printed in the record or not (Rule 10), and that answer has been before this Court also, as will be seen from the transcript of record on a prior petition for a writ of certiorari at an earlier stage of the present cause (see Transcript of Record No. 958, October

term, 1938, pp. 20 *et seq.*). In the sixth defense of the two defendants principally concerned in the case (p. 23 of record above referred to) the bankruptcy proceedings were specifically adverted to and allegations are made that the Trustee alone had title to the lands and moneys involved in the present litigation; that he is the real party in interest; and that he alone has the right to maintain the action.

And in the seventh defense in the same answer (*Ibid.*) it is set forth that by reason of Lane's bankruptcy proceedings, and of his withholding of the property and rights of action in question in scheduling his assets in bankruptcy, he is estopped from proceeding in the state court suit, and the judgment of the bankruptcy court is pleaded as a bar to the maintenance of the action.

It will be recalled that the suit in the state court was instituted just five months after Lane had obtained his discharge in bankruptcy; that at the time of the institution of the suit the bankruptcy proceedings had been concluded, without the appointment of a trustee, and that the proceedings to reopen the bankruptcy cause had not been begun.

Under these circumstances, as has been held by this Court (*Danzinger v. Smith, supra*), Lane had the technical right to institute his action in the state court in his own name, subject of course to whatever action might be taken in connection with the bankruptcy proceedings.

It was indispensable that the McLendons answer in the state court. Had they failed to do so, judgment by default would have been entered against them. But they promptly proceeded to have the bankruptcy proceeding reopened, the discharge vacated, and a trustee appointed, as hereinbefore shown.

The exclusiveness of the jurisdiction of the bankruptcy court following the submission by the respondents to that jurisdiction, notwithstanding anything that may have tran-

spired in the state court, is clearly indicated by the case of *United States Fidelity and Guaranty Company v. Bray*, 225 U. S., 205, 56 L. Ed., 1055, where this Court said:

> "We think it is a necessary conclusion from these and other provisions of the act that the jurisdiction of the bankruptcy courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection, and reconsideration of claims, the reduction of the estates to money, and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them.
>
> * * *
>
> "A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way, as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain when, as here, an important part of the administration is sought to be effected through the slower and less appropriate processes of a plenary suit in equity in another court, involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainanant and the indemnitor banks.
>
> "Of the fact that the suit was begun in the circuit court with the express leave of the court of bankruptcy, it suffices to say that the latter was not at liberty to surrender its exclusive control over matters of administration, or to confide them to another tribunal."

In the case of *Isaacs v. Hobbs Tie & Timber Co.*, 282 U. S., 734, 75 L. Ed., 645, this Court said:

> "The jurisdiction in bankruptcy is made exclusive in the interest of the due administration of the estate

and preservation of the rights of both secured and unsecured creditors. This fact places it beyond the power of the court's officers to oust it by surrender of property which has come into its possession."

Respectfully submitted,

HENRY E. DAVIS,
SAMUEL WANT,
H. C. JENNINGS,
Attorneys for the Respondents.

(17)



# Supreme Court of the United States

OCTOBER TERM, 1943

No. 830

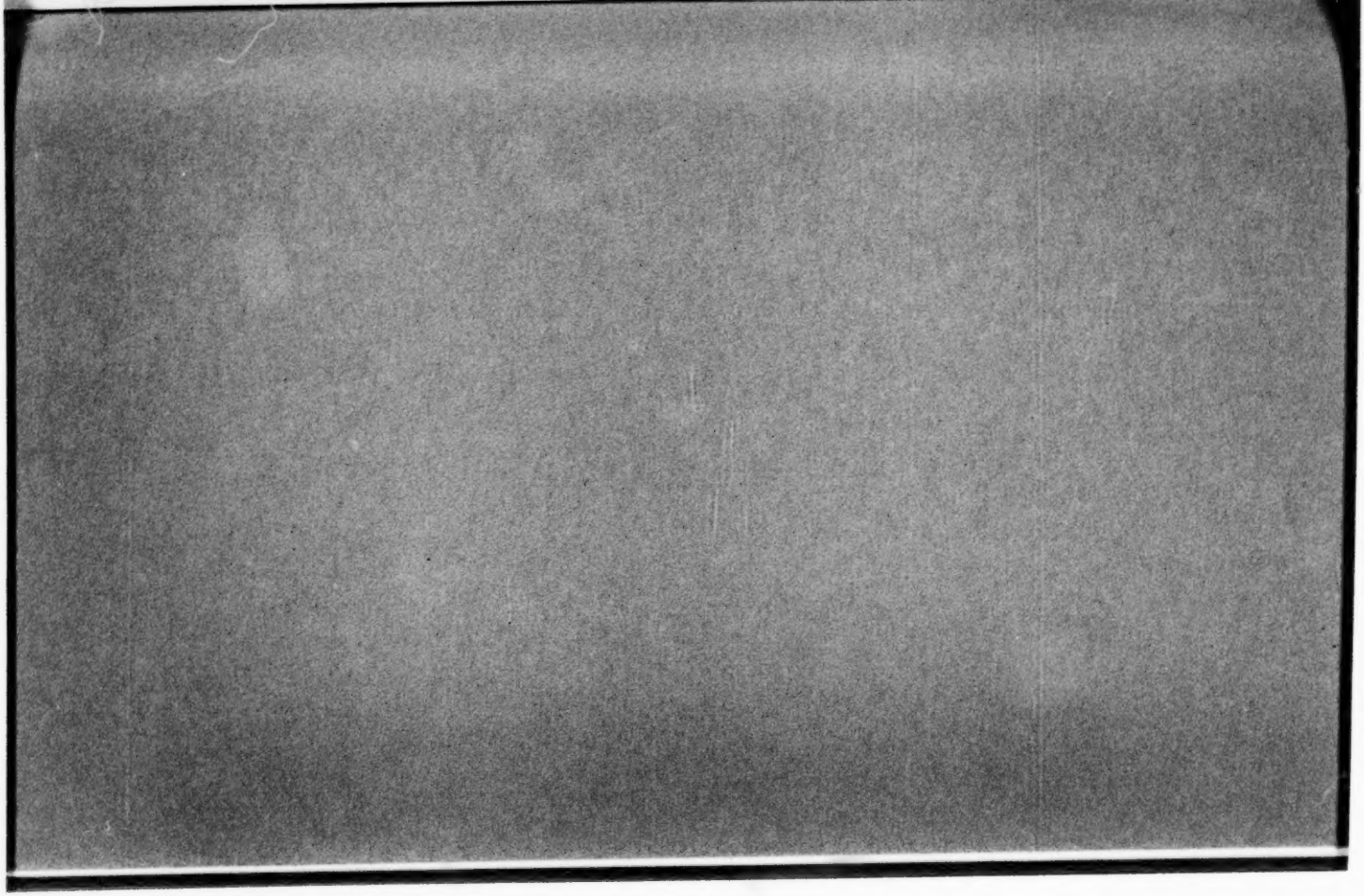
MELVIN HYMAN, AS TRUSTEE IN BANKRUPTCY OF JOSEPH BENJAMIN LANE, AND JOSEPH BENJAMIN LANE, PETITIONERS.

*versus*

R. W. McLENDON, W. E. McLENDON AND C. E. McLENDON, RESPONDENTS.

## PETITIONERS' POINTS AND AUTHORITIES IN REPLY

SAM J. ROYALL,
J. J. WRIGHT,
C. B. RUFFIN,
M. W. SEABROOK,
Counsel for Petitioners.



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MELVIN HYMAN, AS TRUSTEE IN BANKRUPTCY OF JOSEPH BENJAMIN LANE, AND JOSEPH BENJAMIN LANE, PETITIONERS.

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## POINTS AND AUTHORITIES IN REPLY

Although the sole question presented to this Court is that of jurisdiction, the respondents (McLendons) in their "Reply Brief" start out by trying to muddle in, according to their first topic, "THE FACTS" on a very incomplete and imperfect record, making inferences and innuendos, to accept which the Court will be forced to go outside of the record.

They pose the specious but unsound proposition that if the jurisdictional objection is sustained by this Court, the Trustee would have to proceed with litigation in the state court in the face of a "final ruling" in the federal court that neither he nor the bankrupt has any rights in the premises. The answer is this:—

> "Where the Court below has no jurisdiction of the case in any form of proceeding, this court will, if judgment is for the defendant or respondent, direct the cause to be dismissed; if for the plaintiff or peti-

> tioner, it will reverse the judgment or decree, and remand the cause, with directions to dismiss the suit."
>
> *Stickney v. Wilt*, 23 Wall. 150, 23 L. Ed. 50.

The petition of the McLendons, beginning at page 20 of the record will, if the jurisdiction objection be sustained, be no doubt disposed of in accordance with the foregoing, and the above mentioned so-called "final ruling" treated as a nullity, in no sense binding on the state court or any other court.

Counsel's position that the facts of this case have become moot on the theory that the McLendons have bought up the judgments against Dr. Lane does not fairly present the case and is not supported by the record. The only thing that we know of in the record that tends to support any such proposition is the quotation in the respondents' brief from the U. S. Circuit Court of Appeals to the effect that, *as they understand from the argument*, the greater portion of the debts listed by the bankrupt are owing to the McLendons or to corporations owned or controlled by them. This must have come from something said in oral arguments by counsel for the McLendons; because the petitioners are not informed other than by such hearsay statements of any such status; and we are unaware of anything in our printed briefs that justifies any such conclusion by the court. The Special Master's Report at page 57 of this record shows that the debts of Dr. Lane amount to only $24,045.63 of which $19,270.81 were judgments. On the other hand, as shown by the complaint, the demands involved in this case reach considerably upwards of $85,000.00. If the McLendons owned the judgments, then clearly they do not own the entire estate. In fact, we doubt if Dr. Lane is really a bankrupt; because if he is not entitled to the relief sought he stands discharged as a bankrupt; and, if he is entitled to the relief sought, then he has vastly more than enough to pay his debts.

It is true that the special referee indulged in the remarkable view that Dr. Lane was estopped, while his trustee

in bankruptcy could proceed to enforce his claim; but we can not see how this can be reconciled with the principle that a trustee acquires no greater rights than the bankrupt had.

*York Manufacturing Company vs. Cassell,* 205, U. S. 344, 50 L. Ed. 782-785, 20 Sup. Ct. 481.

*Hewit vs. Berlin Machinery Works,* 194 U. S. 296, 48 L. Ed. 986, 24 Sup. Ct. 690.

*Thompson vs. Fairbanks,* 196 U. S. 516, 49 L. Ed. 577, 25 Sup. Ct. 306.

*In Re: K. T. Sandwich Shoppe of Akron, Inc.* 34 F. (2d) 962.

Indeed, it seems to us shocking to contemplate even the idea that if Dr. Lane has been defrauded by the McLendons out of more than $85,000.00 in money and property, as he stoutly maintains, that simply because he owes some $21,000.00 of that amount, those who defrauded him should be allowed to keep the remaining $61,000.00 or more on the sophistical grounds advanced in this case.

Further discussion of this subject would lead us into the merits of this case in a very incomplete, one-sided, and unfair state of the record. If this Honorable Court will order before it the entire record in some way that Dr. Lane can finance, we shall be only too glad to meet issues like this; but, as we are merely presenting the jurisdictional question, we feel that the effect of counsel's argument is to stray far beyond the scope of the record that is being presented to this Honorable Court.

To hold that the Trustee has the right to recover from the McLendons, if it is shown that they are due Dr. Lane anything, sufficient funds to pay his creditors, but that Dr. Lane is estopped from getting back from them the difference between what is due the creditors and what they have of his, would be, it seems to us, putting the stamp of approval upon an attorney's obtaining, while he bore the confidential relationship to his client, large sums of money and title to property, under the guise of obtaining

this to pay the creditors and save the property for the client; and then because the client may have been derelict or negligent in taking steps sooner to recover the property, that he is now estopped from doing so, and that the party who thus defrauded him may keep it. We cannot conceive of a court of equity putting its stamp of approval on any such dealings.

## JURISDICTION OF BANKRUPTCY COURT

It seems rather inconsistent to us to find counsel exerting a great effort to becloud the question of jurisdiction by intimating through their argument, without openly saying it, that this proceeding is plenary instead of summary.

This is totally inconsistent with their position on the former appeal. There, as the basis for dismissing our appeal because of not having been brought within thirty days, the Circuit Court of Appeals very plainly stated that the position that this was a plenary suit could not be sustained (102 F. (2nd), 189, 190).

As stated in brief subjoined to the petition to the U. S. Supreme Court we make no question about a trustee in Bankruptcy as an officer of the court being subject to its control; but we question the power of the court to think and act for the trustee and to make him a perfect automatom and to leave him without any independence of conduct in the matter of giving or withholding his consent to the jurisdiction of any court, which choice the statute confers upon him. We respectfully submit that counsel's innuendo about this litigation constituting the grossest kind of mockery and indeed definance of the bankruptcy court, etc. is entirely out of place, unsupported by the record, improper, and, "shows a comparable attitude of cynicism and indifference" (to quote from them) in trying to prejudice an august tribunal like the U. S. Supreme Court from passing on the fair interpretation of a plain Act of Congress in relation to jurisdiction!

Since brevity is a prime consideration in the preparation of this reply, we will prolong it no further than to point out the length to which counsel have gone in their effort to defeat a hearing of this case by this Honorable Court by citing authorities that are totally out of point, to wit:—

On page 17 of their brief, respondents contend that the right to have a controversy involving the adverse claimant or his property determined by the Federal Court of Bankruptcy is a privilege that belongs to such claimant alone, and if he sees fit to submit himself and his rights to the jurisdiction of the Federal Court and ask such Court to adjudicate all controversies between him and the bankrupt, or the trustee in bankruptcy, neither of these can raise the slightest objection. And they cite cases.

The first of these cases is *United States Fidelity & Guaranty Co. vs. Bray*, 225 U. S. 205, 56 L. Ed. 1055. Now, that case was not one, like the case at bar, where the Trustee and the Bankrupt are suing the adverse claimant to recover the money and the property but affected a fund of $26,000.00 in the hands of the trustee in bankruptcy then in the course of administration. The United States Supreme Court itself clearly distinguishes that case from cases like the one at bar in the following quotation from the decision, to wit:—

> (225 U. S. 216; 56 L. Ed. 1061, 1062): "We are not here concerned with a suit by a trustee to recover property in the possession of another who claims it adversely, nor with a suit against a trustee to recover property in his possession claimed by another, and therefore the jurisdictional questions incident to suits of that character need not be considered. But we are concerned with a suit against a trustee, the purpose of which is to control the distribution of a fund in his possession, admittedly belonging to the bankrupt's estate, and to determine to what extent and in what order the several creditors shall participate therein."

And the *Bray Case*, moreover, serves only to bolster the Petitioners proposition (page 23 of their brief) that "the Court that is first in time is first in right". In this case, the State Court was distinctly first in time, and hence was first in right.

The case of *Schumacher vs. Beeler*, 293 U. S. 367, 79 L. Ed. 433, was originally brought by the trustee in the Federal Court and the other party consented for all matters to be heard in the Federal Court, and the Supreme Court pointed out that the purpose of the bankrutcy act was to leave controversies with adverse claimants to be heard and determine for the most part in the state courts. The case does not in any sense support the interpretation placed upon it by counsel for the respondents here.

In like manner *Re*: *Hollingsworth & Whitney Co.*, 242 Fed., 753 (C. C. A., 1st) had in it nothing that resembles the question now at bar. In that case the trustee was already in the bankruptcy court and was not contesting its jurisdiction.

*Peoples National Bank vs. Green*, 296 Fed. 294 (C. C. A. 4th) is irrelevant to the present question; because no issue was made by the trustee as to the jurisdiction of the bankruptcy court.

*Re*: *Bennett*, 285 Fed. 351 (C. C. A. 7th) was a case in which the adverse party objected to the federal jurisdiction, and the trustee sought to maintain it. The case was remanded to the state court; which demonstrates, exactly to the opposite of what the respondents McLendon are contending for here, that the lack of consent of *one* of the contesting parties to the federal jurisdiction defeats it.

Indeed, on account of the fact that the trustee, Melvin Hyman, resorted to the state court in the first instance for the prosecution of this claim, the State Court had full

control over the litigation. *Brown vs. Gerdes,* 64 Sup. Court 487 (decided Feb. 7th, 1944).

Respectfully submitted,

SAM J. ROYALL,
J. J. WRIGHT,
C. B. RUFFIN,
M. W. SEABROOK,
Attorneys for the Petitioners.